3-16-2005

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Recommended Citation
Robert M. Bloom. "Jury Trials in Japan." *Loyola of Los Angeles International and Comparative Law Review* 28, no.1 (2005): 35-68.

JURY TRIALS IN JAPAN[1]

Robert M. Bloom*

INTRODUCTION

In the late 1980s, I hosted a group of Japanese lawyers and judges from the Osaka Bar Association Committee for Judicial System Reform,[2] a group interested in observing the jury system in the United States. I took them to the Massachusetts Superior Court[3] where they could observe jury trials. From the discussions I had with the visitors, it was clear that they were keenly interested in the concept of citizen participation in the legal process.

Japan's commitment to democracy has flourished for 60 years, and is enshrined in the preamble of its post-World War II[4] Constitution: "Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by

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[1] Author wishes to thank Franklin Schwarzer, Arielle Simon and Ben Steffans, students in the class of 2006 at Boston College Law School. In addition he greatly appreciates the valuable insights provided by Judge Naoko Sonobe of the Family and District Court who during 2004-2005 was a visiting scholar at Boston College Law School. He also appreciates the thoughtful comments received by Professor Satoru Shinomiya Waseda University Law School, Tokyo Japan.

[2] This group was headed by Professor Takashi Maruta of Kwansei Gakuin University School of Law.

[3] The Trial Court of general jurisdiction in Massachusetts.

[4] Promulgated on November 3, 1946 and went into effect on May 3, 1947. The constitutional monarchy with a sovereign emperor was superseded by a constitutional democracy in which sovereignty is entrusted in the people. There are three branches the legislative (Diet), executive (the cabinet and prime minister), and the Courts. The Diet chooses the prime minister who heads the cabinet. *See, e.g.*, Scott M. Lenhart, *Hammering Down Nails*, 29 GA. J. INT'L & COMP. L. 491 at 494; 1995 BYU L. REV. 691 at 709 (discussing fact that Japanese Cons. was drafted by Americans).

the people."[5] Despite this textual commitment, jury trials, a wonderful vehicle for citizen participation in governmental operation, have not existed in Japan since 1943.[6]

The French political philosopher, Alexis de Tocqueville commented that the jury functions as "a political institution…one of the forms of the sovereignty of the people."[7] The framers of the United States Constitution envisioned jurors not only as a democratic check on the government's efficacy of the court system but also as a way to ensure citizen participation in governmental activity.[8]

Inspired largely by the United States Constitution and the American experience with jury trials[9], Japan has sought to introduce jury trials. The objectives of this reform are to ensure greater participation by average citizens within the Japanese judicial system and to establish a check on the power of the judiciary. Japan's desire to adopt jury trials is the latest in an international trend toward increasing the participation of citizens in the legal process, particularly in criminal trials.[10] Being a juror is envisioned as a way to

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[5] Japanese Constitutional Preamble.

[6] Kent Anderson and Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT'L. L. 935, 962-63 (2004).

[7] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 291 (Knopf 1945) (1835).

[8] Insight can be found in the language of Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (stating: "The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."). *See also* United States v. Booker, 125 S.Ct. 738 (2005) (reiterating the importance of a right to a jury trial for a convicted defendant).

[9] Robert J. Grey, *Justice through Juries*, ABA Journal p.8 (January 2005) (stating: "There are more than 80,000 jury trials in this country every year with nearly a million Americans empanelled to serve. More than five times that number take time out of their busy schedules to show up to their local courthouse after receiving a summons. Besides voting, few activities in the life of the typical American offer this kind of active participation in our system of government.")

[10] "Lay participation in the affairs of state is the foundation of a democratic society. Just as the participation of laypersons is unquestioned in the legislative and executive branches of

involve average Japanese citizens in the operation of government, a sentiment reflected in the language of the Justice System Reform Council (JSRC).[11] "What commonly underlies these reforms is the will that each and every person will break out of the consciousness of being a governed object and will become a governing subject…"[12] De Tocqueville captured the same intent when he commented on the American jury: "Juries invest each citizen with a sort of magisterial office; they make all . . . feel that they have duties toward society and that they take a share in its government."[13]

Following the recommendations of the JSRC, the Japanese Diet enacted legislation to create jury trials, and in 2009 the Japanese will institute jury trials for serious crimes, such as those involving bodily injury.[14] The legislation creates a mixed-jury system where citizens and professional judges determine criminal responsibility and sentencing. Specifically, six ordinary citizens (saiban-in) and three professional judges

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government in a democratic society, in many countries it has played an important part in the administration of justice as well. In countries making the transition to democracy, legal reformers should therefore consider how lay participation could serve to achieve the universal goals of criminal procedure in a democratic society, that is, the ascertainment of the truth of the charge so as to ensure the conviction of the guilty and the exoneration of the innocent, the respect of the human dignity of the accused and the victim in the criminal trial, the protection of society, restorative justice, the resolution of conflict and rehabilitation and reintegration of offenders. In doing so, such countries should look to the experiences of other countries as well as to their own legal history and tradition in assessing the proper role for lay participation in the administration of criminal justice. Although the economic cost of introducing lay participation is a valid consideration, legislators should be careful to not use this factor as an excuse for postponing otherwise necessary and useful reforms." Stephen C. Thaman, Symposium on Prosecuting Transnational Crimes: *Cross-Cultural Insights for the Former Soviet Union*, 27 SYRACUSE J. INT'L L. & COM. 1, 59-65 (2002) (comments at a conference at the International Institute of Higher Studies in the Criminal Sciences, "Lay Participation in the Criminal Trial in the XXIst Century" at Siracusa, Italy, 5/25-5/29/1999.)

[11] See discussion *infra* section, History of Reform.

[12] JUSTICE SYS. REFORM COUNCIL, *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century*, (English Version, 2001).

[13] DE TOCQUEVILLE, *supra* note 7.

[14] *Reinstating a Jury System*, JAPAN TIMES, May 29, 2004 (reporting details of the legislation). Jury trials have been dormant in Japan since 1943. Japan had enacted a Jury law in 1923 and took effect in 1928 there was widespread use of jury based decisions by the courts. However, as Lester W. Kiss notes, the jury system failed in 1943 because of the fascist political climate, procedural defects in the system which gave ultimate authority to the judge, and finally the Japanese respect for authority which held judges in great reverence. *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS. 261 (1999). *See also* Anderson and Nolan, *supra* note 6 at 962-63.

will constitute the jury. Decisions are made by a majority of the group (5-4) provided that at least one citizen and one regular judge agree. In cases where the defendant pleads guilty, and both parties consent with court approval, a panel consisting of four citizens and one professional judge will determine the appropriate sentence.

This article will point out that despite the JSRC's noble motives, a mixed-jury system in Japan will not result in greater participation by ordinary citizens in the Japanese legal system unless additional procedural safeguards are enacted.

This article has five parts. In Part One, I begin by highlighting some differences between mixed-juries and the American jury system and then compare the proposed Japanese mixed-jury system with European mixed-jury systems . In Part Two, I explain why the Japanese opted for a mixed-jury system by examining possible historical and political catalysts for the decision. In Part Three, I explore the psychological theory surrounding collective judgment and how dominant individuals influence the group dynamic. In Part Four, I argue that Japanese cultural attitudes will impede the effectiveness of a mixed-jury system in Japan. Finally, in Part Five, I propose specific procedural devices to overcome the obstacles inherent in the proposed Japanese mixed-jury system that will ensure citizen participation, and accomplish the JSRC's stated objectives.

MIXED-JURY SYSTEM

The concept of juries of twelve and unanimous verdicts had its roots in the Middle Ages.[15] Medieval juries were fact finders in the true sense of the term, as they were selected based upon their familiarity with the parties and the facts of the dispute and were responsible for finding facts outside the realm of court proceedings.

[15] Apodaca v. Oregon, 406 US 404, 407 (1972)

The American-jury system grew out of a desire for more efficient, less-costly, and less arbitrary administration of justice and is deeply rooted in the history and tradition of the United States. [16] In many colonies, the right to a trial-by jury preceded the practice's incorporation into the Constitution.[17] Unlike the medieval juror, they wouldn't do independent fact finding but relied on what was presented in court. The jurors were chosen for their impartiality and told to rely on the presentation of facts as presented by the lawyers.[18] Unanimous verdicts and juries of 12 were largely adopted by the states.[19] In the 1970s, in criminal cases, the requirement for unanimous verdicts and juries of twelve were modified by the Supreme Court.[20] Notably, in addition to various pragmatic considerations, participation on a jury was considered an important exercise of political power.[21] Thus, the jury system was considered an important means to attaining civil liberties and a fundamental pillar of democracy.[22]

A mixed-jury consists of professional judges and ordinary citizens (lay judges) who work together to determine culpability and sentencing.

Mixed-juries differ from juries in the United States in a number of ways. In a mixed-jury system, a legal professional (the judge) provides learned guidance during jury

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[16] Douglas G. Smith, THE HISTORICAL AND CONSTITUTIONAL CONTEXTS OF JURY REFORM, 25 Hofstra L. Rev. 377, 395 (1996).
[17] *Id.* at 421-22.
[18] Stephen C. Yeazell, The New Jury and the Ancient Jury Conflict, 1990 U Chi. Legal F. 87.
[19] Apodaca 406 U.S. at 408, n.3. Although in the 17th Century, the Carolinas, Connecticut and Pennsylvania allowed for majority votes.
[20] *See Id.* At 413 (allowing for verdicts of 10-2); See also Williams v. Florida, 399 U.S. 78 (allowing for a six person jury in criminal trials). Apodaco and Williams were both cases originating in the state court system. The Supreme Court was interpreting the Sixth Amendment to the U.S. Constitution which states "In all criminal prosecutions the accused shall enjoy the right to speedy and public trials by an impartial jury…" This amendment was made applicable to the states by the Fourteenth Amendment. Duncan v. Louisians 391 U.S. 145 (1968). Although it should be pointed out that Federal Rule of Criminal Procedure 3(a) requires an unanimous verdict and Federal Rule of Criminal Procedure 23(b) requires a 12 person jury unless otherwise stipulated.
[21] *Id*.
[22] *Id*.at 425.

deliberation,[23] a potentially beneficial structure given the common lack of comprehension by jurors of the judge's instructions on the law in the United States.[24] Another positive aspect of a mixed-jury system is the more active role of jurors, who may have an opportunity to ask questions during the trial process.[25] Additionally, in mixed-jury systems, jurors often serve for multiple years and hear numerous cases. In this way, with a greater experiential base, they might be able to act with more confidence with a professional judge and thereby more readily express their opinions.[26] Unlike the United States where generally unanimous verdicts are required for conviction of a crime, a majority vote usually determines culpability in a mixed-jury system. In addition, because of mixed-juries decide issues of fact and law, they avoid the difficult dilemma facing juries in the US who are forced to separate questions of law and fact.[27] Mixed-juries also participate in the sentencing as well as the adjudication of a case.

In the United States, the jury verdict is not subject to appeal by the state in criminal prosecution because of double jeopardy protection[28] and appeals by the defendant are limited in most instances to law with the finding of facts by the jury given

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[23] *See, e.g.* Markus Dirk Dubber, *The German Metaphysical Volk: From Romantic Idealsim to Nazi Ideology*, 43 AM. J. COMP. L. 227, 257 (1995); Thomas Weigend, *Symposium: Comparative Criminal Justice Issues in the United States,West Germany, England, and France*, 42 MD. L. REV. 37, 62 (1983).
[24] *See generally* Walter W. Steele Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate* 67 N.C. L. REV. 77 (1988) (finding jury understanding of court instructions extremely low).
[25] Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA L. REV. 441, 448-449 (1997). There is a movement in the United States for greater involvement of jurors. *See, e.g.*, 32 U. MEM. L. REV. 1, 35 (reforms in Tennessee allowing for juror note-taking and questioning of witnesses) *see* Nicole L. Mott, The Jury in Practice: *The Current Debate on Juror Questions: "To Ask or Not to Ask, That is the Question,"* 78 CHI.,-KENT L. REV. 1099 (2003) (surveying the pluses and minuses of jury questioning). This practice has been implemented in Arizona. *See, e.g.*, ARIZ. R. CIV. P. 39(b)(10); ARIZ.R. CRIM. P. 18.6(e); Michael Dann & George Llogan III, Jury Reform: The Arizona Experience, 79 Judicature 280 (1996) (discussing the Arizona reforms); Larry Heuer & Steven Penrod, I*ncreasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 Judicature 256 (1996) (discussing results of a study designed to observe effects of juror questioning).
[26] Smith, *supra* note 25, at 462.
[27] The jurisdiction of United States juries is limited to factual determinations.
[28] The fifth amendment to the United States Constitution states, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

great deference. In most mixed-jury systems, there can be a de-novo review of both law and fact.

While all mixed-jury systems have certain basic traits in common, the countries that utilize a mixed-jury system have taken widely varying approaches on jury size, voting requirements, whether and how appeals are handled, how jurors are selected, and what type of cases the jury can hear.

The legislation passed by the Japanese Diet has laid out some of the procedural requirements of a mixed-jury system. In cases in which guilt is contested, the jury will be a panel of nine: six lay jurors and three judges.[29] In cases where there is an acknowledgment of guilt and consent by the parties, the panel shall consist of one judge and four lay jurors.[30] Jurors shall be 20 years or older and able to vote.[31] Convictions shall be by a majority vote provided that one lay judge and one professional judge agree. The jurisdiction of the mixed-jury is restricted to those cases which are punishable by death, life imprisonment, or imprisonment for at least a year where the crime committed by an intentional act caused the death of a victim.[32] There is also a provision for an immediate appeal.[33] The three-judge Court of Appeals (Kososhin) considers both the law and the facts of the jury trial. Appeals can be taken by either the defense or prosecution.

While Japan's approach to mixed juries borrows heavily from similar systems in Europe, Japan's proposed mixed jury system is unique. By briefly examining how mixed juries operate in Italy, Germany, Denmark and France, one gets a better idea of how the

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[29] *Law for Criminal Trial in which Saibin-in Participate*, , art. 2, no. 2 [hereinafter *Criminal Trial*].
[30] *Id.* at art. 2 no. 3.
[31] *Id*. at art.14.
[32] *Criminal Trial*, *supra* note 29, at art. 2, sec. 1 a, b. In 2003 this amounted to a total of 3089 cases. http://courtdomino2.courts.go.jp/saibanin.nsf/ea145664a647510e492564680058cccc/58….
[33] This is provided by the Japanese Code of Criminal Procedure. *Criminal Trial*, *supra* note 29, at art. 82-4.

Japanese system will differ from European mixed-juries, and what aspects of the mixed jury system the JSRC found especially important.

Italy

The Corte d'assise, Italy's version of the mixed-jury, is composed of one professional judge who serves as "president of the court," one professional judge from the Tribunale (an all professional judge court), and six lay judges.[34] To qualify for service as a lay juror one must possess Italian citizenship, exhibit good moral conduct, be between the ages of thirty and sixty-five, and have completed secondary school education.[35] The lay jurors preside over the trial with the professional judges and enjoy equal judicial authority.[36] The jurisdiction of the Corte d'assises, is limited to cases involving serious crimes, such as those that result in death or are punishable by a prison sentence from twenty-four years to life, and crimes against the state (treason).[37] A simple majority is required for deciding guilt or innocence, and sentencing. Tie votes are interpreted as an acquittal, yet the most lenient punishment will prevail if no simple majority is attained.[38] Appeals from the Corte d'assise in Italy are heard by the Corte d'assise d'appello, which is also made up of two professional judges and six lay jurors.[39] Because in Italy, broad appellate rights are afforded both parties, issues of law and fact can be appealed by the defendant or the prosecution and either side may introduce new evidence to the appellate tribunal.[40] The Corte di Cassazione is the highest of the

[34] Ottavio Campanella, *The Italian Legal Profession.* 19 J. Legal Prof. 59, 78 (1994).
[35] Stephen Freccero, *An Introduction to The New Italian Criminal Procedure*, 21 Am. J. Crim. L. 345, 351, n. 25 (1994)
[36] Campanella, supra at note 34 at 78.
[37] Excluding omicidio colposo (negligent homicide), which is under the jurisdiction of the Pretura. *Criminal Trial*, *supra* note 29, at arts. 5, 7.
[38] *Id.*
[39] Campanella, supra at note 34 at 78.
[40] William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1 (1992).

appellate courts in Italy.[41] This court is responsible for reconciling matters of law and is not concerned with matters of fact. Each section of the Corte di Cassazione is comprised of five professional judges.

France

The Cour d'assises, the only court in the French criminal system that uses a mixed-jury, has jurisdiction over serious crimes, punishable by a prison term in excess of ten years.[42] The jury is made up of three professional judges and nine lay jurors.[43]All decisions regarding culpability or punishment, unfavorable to the defendant must be made by an eight-to-four majority.[44] In France, jurors must possess French citizenship with full privileges, be between the ages of twenty-three and sixty-one, and be able to read and write.[45] Due to the perceived influence of the local government, lay jurors cannot be civil servants, government ministers, parliamentarians, police or military officials.[46]

Jurors are selected at random from the electoral role.[47] After being screened by a joint committee, a final selection list is drawn up.[48] Thirty days before the Cour d'assises first sits, a panel of thirty-five jurors is selected, from which nine are selected for any

[41] Campanella, *supra* at note 34 at 79.
[42] Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial For an American Murder in the French Cour d'assises*, 2001 U. ILL. L. REV., 791, 800 (2001); Edward A. Tomlinson, *Non-Adversarial Justice: The French Experience***,** 42 MD. L. REV. 131, 142-3 (1983);
[43] *Id*.
[44]COMPARATIVE CRIMINAL PROCEDURE (John Hatchard, Barbara Huber, & Richard Vogler, eds., B.I.I.C.L. 1996) at 74.
[45] Lerner, *supra* note 42 at 815-16.
[46] COMPARATIVE CRIMINAL PROCEDURE *supra* note 44 at 74.
[47] *Id.*
[48] *Id.*

particular case by the president in open court.[49] There are a total of nine preemptory challenges, five challenges for the defense, and four for the prosecution.[50] No appeal, except concerning issues of law, is possible from the Cour d'assise.[51] This is likely because the defendant was afforded a jury of his peers and all decisions of the Cour d'assise are automatically reviewed by a subdivision of the appellate court without request from either the prosecution or defense.[52] Issues of law may be appealed to the Supreme Court of Appeal (Cour de Cassation).[53] The appellate jurisdiction of this court is limited to: (i) a decision by an irregularly constituted tribunal, (ii) jurisdiction questions, (iii) decision in breach of procedural requirements, (iv) a decision not supported by written grounds, and (v) a decision not supported by law.[54]

Germany

In Germany, there are two mixed jury systems and the first-instance courts are broken into three categories: Local Court, District Court, and Supreme Court.[55] The mixed-jury section of the Local Court has jurisdiction over misdemeanors punishable by up to three years in prison, and consists of a panel containing one professional judge and two lay jurors. The District Court has a second type of mixed jury which is comprised of three professional judges and two lay judges and has jurisdiction over serious misdemeanors, capital offenses, and crimes punishable by over three years in prison.[56]

[49] *Id.* at 53,74.
[50] *Id.* at 74.
[51] *Id.* at 53.
[52] *Id.* at 54.
[53] *Id.* at 55.
[54] *Id.* at 55-56
[55] *Id.* at 102-103 (discussing the jurisdiction and composition of German Mixed Juries).
[56] *Id.*

The Supreme Court, consisting of five professional judges, has sole jurisdiction over crimes against the state, including murder.[57]

For the mixed-juries in both the Local Court and the District Court, a two-thirds majority is required for any decision on guilt or innocence or punishment. The appellate system in Germany is slightly more complicated than its continental counterparts. If one of the two parties is not satisfied with the judgment, it has two remedies: appeal or revision.[58] An appeal may be made against a decision of the local court and will address issues of fact and law.[59] These appeals proceed as a new trial with the appellate court re-hearing evidence.[60] However, this appeal is discretionary and can be denied if the appellate court believes the decision of the trial court was correct.[61] The District Court presides over these "re-trial" appeals[62] and such appeals are not afforded against decisions of the Supreme Court or of the District Court when it serves as a court of first instance.[63]

Unlike the appeal procedure, the revision procedure considers only matters of law and seeks to provide legal consistency throughout the German Republic.[64] All first instance decisions are subject to appeal by revision,[65] presided over by the Supreme Courts and Federal Supreme Court.[66] Appeals by revision do not re-consider facts and will only occur where if the original judgment was procedurally incorrect or not

[57] *Id.*
[58] *Id.* at 132-133.
[59] *Id.* This is distinct from its American counterpart which only allows for appeals on issues of law.
[60] *Id.* These re-trials are subject to similar procedural rules.
[61] *Id.* This extends to appeals on matters of fact and matters of law.
[62] Id. at 102-103. This appellate version of the district court is composed of three professional judges and two lay judges and acts as a retrial.
[63] This is likely because of the large size of the presiding bench. *Id.*
[64] *Id.* at 133.
[65] *Id.*
[66] *Id.* These are two wholly professional entities.

supported by substantive law.[67] In this sense the appeals by revision process is very similar to the appeals process in the United States. The German system acts to insure legal consistency throughout the country by subjecting these decisions to revision by the highest courts in Germany.

Denmark

Denmark adopted its mixed-jury system in 1937 as a means of expanding public participation in criminal trials.[68] Lay participants are used only in cases where the defendant pleads not guilty. [69] Where the potential punishment is more than four years, involves a political crime, or involves a question about the defendant being placed in an institution, juries of twelve lay participants determine guilt.[70] Only economic crimes are excluded from the jurisdiction of jury trials as they are thought to be too complicated.[71] A 2/3 vote of 8 to 4 is required for conviction.[72]After reaching a guilty verdict, the jury then deliberates with three professional judges to determine sentencing.[73] Each of the professional judges has four votes equaling the votes of the twelve jurors.[74] In the event of a tie, the defendant receives the lesser penalty.[75] Appeals in these cases are handled by the Supreme Court which can alter the length of the penalty, decide whether the High

[67] *Id.*
[68] Stanley Anderson, *Lay Judges and Jurors in Denmark*, 38 Am. J. Comp. L. 839, 840 (1990)
[69] Eva Smith, *The Danish Jury and Mixed Court System*, 2002 St. Louis-Warsaw Transatlantic L. J. 29, 31 (2003)
[70] *Id.*
[71] *Id.*
[72] *Id*. at 34
[73] See Anderson, supra at note 68 at 839.
[74] *Id.* at 844.
[75] *Id.*

Court made errors of law, or determine whether there were procedural errors.[76] The Court does not review the jury's decision of guilt.[77]

Criminal charges that might result in more than a fine but less than four years of prison are initially heard in Municipal Court.[78] In these cases, the mixed jury consists of two lay judges and one professional judge, who determine guilt and sentencing.[79] In these cases any question, including guilt, can be appealed.[80] Appeals are handled by another mixed-jury consisting of three lay participants and three professional judges in the High Court.[81] While typically a case can only be appealed once, in very special circumstances, the decision of the mixed-jury on the High Court can be appealed to the Supreme Court. [82]

HISTORY OF REFORM

Academics have highlighted several reasons for Japan's renewed interest in jury trials In his article, Kiss[83] discusses several of these factors, including the aura of cynicism that surrounds the judiciary. Anderson and Nolan point out that in addition to the desire to deliver better justice and better democracy, some Japanese view a lay

[76] See Smith, supra at note 69 at 31.
[77] *Id.*
[78] *Id.* at 37
[79] *Id.*
[80] *Id.* at 39.
[81] *Id.*
[82] *Id.* (If the case is determined to present a problem of principle or special circumstance, it may be appealed to the Supreme Court. Permission for this must be granted by a board consisting of three judges , a lawyer and a professor from one of the universities).
[83] *Reviving the Criminal Jury in Japan, supra* note 14.

assessor system as necessary to ensure international competitiveness in the 21st century and as a means of making trials shorter and more efficient.[84]

One reason for the current reforms were a series of highly controversial criminal cases in the 1980s. Between 1983 and 1989, there were four controversial death penalty cases involving overturned confessions. The four wrongfully convicted defendants in these cases spent a combined 130 years in prison before ultimately being released.[85] The publicity associated with these cases reflected especially adversely on the judiciary. Specifically, the cases highlighted that the Japanese criminal justice system had a 99.9% conviction rate, with judges almost always supporting the prosecution. [86] In 1987, as a result of the judiciary's role in these four wrongful convictions and mounting domestic pressure for reform, Chief Justice Koichi Yaguchi of the Japanese Supreme Court initiated a study examining the feasibility of the jury system in Japan.[87]

Judges in Japan are chosen from a competitive exam after college graduation.[88] The low passage rate on this exam suggests that judges represent a highly intelligent, well-educated part of society.[89] They are an elitist, homogenous group with limited life

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[84] *Supra* note 6

[85] Daniel Foote, *From Japan's Death Row to Freedom*, 1P AC. RIM L. & POL'Y J. 11 (1992) (documenting cases).

[86] Yumi Wijers-Hasegawa, *Jury System Needs to be Made Accessible for Citizens*, THE JAPAN TIMES, August 5, 2003 (explaining the high conviction rate might be that prosecution only brings airtight cases-judge sonobe is the source**). *See* David T. Johnson, THE JAPANESE WAY OF JUSTICE, 215-218 (2002) (finding this prosecutorial practice as well) *See also,* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (noting, "Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States." It would also suggest another reason for the high conviction rate is that prosecutors tend to bring only strong cases.**

[87] *See* Foote, *supra* at note 71 at 83-84.

[88] One becomes a judge after taking the National Legal Examination (Shilo Shikh) then followed by two years of apprentice training. *See* Kiss *supra* note 14.

[89] Pass rate was 2.75% in 2001. Exam taking is a very important part of Japanese society. Japanese describe their society as gaku-reki shakai, one which an individual's future is determined by their academic record.

experience.[90] Given their youth at the commencement of their judgeship, they tend to be more impressionable and are therefore subject to greater influence by some of the veteran actors in the system.[91] In addition, judges wish to avoid an appellate court overturning their decisions, which could hinder their career.[92] Moreover, the success of a judge's career in Japan seems linked to his/her readiness to defer to the ruling party and thus find in favor of the prosecution.[93] Thus there is an incentive to find guilt in order to avoid an appeal by a prosecutor.[94]

In addition, because of their societal status, judges are often isolated from ordinary people. The jury will expose the judge to ordinary citizens who bring their own life experiences to their work as jurors. It is hoped that the introduction of lay jurors into the decision-making process will make judges more accessible to the public they serve. The American jury was similarly intended to keep "class instincts of the judge in check."[95]

There are juku (exam cramming schools) because passing examinations is so important. Twelve years of pre-college education culminates into two examinations. One taken by all Japanese High School seniors on the same day and the other for specific university admission.

[90] Richard Lempert, *Jury for Japan?* 40 AM. J. OF COMP. L. 37(1992). *See also* John Haly, *Judicial Independence in Japan Revisited,* 25 LAW IN JAPAN 1, 16-18. (1995).

[91] Judges in the United States are chosen or elected usually after an extensive legal career. Therefore, they have greater life experience.

[92] This is generally believed because of the bureaucratization of judges so they tend to defer to wishes of politicians and government officials. However a conversation with a Japanese Judge, she noted that she hopes that by exposing the system to citizens they will see that this assumption is largely a myth.

[93] *See, e.g.*, Hiro Iwamura, *Memoir of International Trade Law: Issues of Translating WTO Safeguard Provisions into Japanese,* 5 ASIAN-PAC. L. & POL'Y J. 188, 210 (2004) (continuity of ruling party causes judiciary to make decisions in accord with ruling party); M. Christina Luera, *No More Waiting for Revolution: Japan Should Take Positive Action to Implement the Convention on the Elimination of All Forms of Discrimination Against Women* 13 PAC. L. J. 611, note 56 (2004) (Japanese Judiciary defers to LDP politicians on sensitive issues because those who do enjoy better careers);); David Johnson, *Review Symposium on Kagan's Adversarial Legalism: The American Way of Law: American Law in Japanese Perspective Robert A. Kagan* **28 LAW & SOC. INQUIRY 771, 781 (2003).**

[94] THE JAPANESE WAY OF JUSTICE, *supra* at note 86 (suggesting the conviction rate is at least 96.6%).

[95] Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 696 (1973).

While the wrongful conviction cases and the high rate of convictions might have contributed to the exploration of juries in Japan, the major reason for the introduction of juries seems to be the idea of greater citizen participation in the running of the government. Indeed, as Richard Lempert notes, "The fact that jurors do bring non-legal values and understanding to their deliberations is regarded by many as a virtue of the jury system and a way of introducing an important democratic voice into the least democratic of the three bricks of the modern liberal state government." [96]

In July 1999, the Japanese Cabinet formed the Justice Reform Council (JRC), a working group of thirteen prominent lawyers, academics and business executives[97], and asked them to design a Japanese judicial system for the 21st century. One of the project's major objectives was to enhance the legitimacy of the judiciary.

> This Council sincerely hopes that these Recommendations provide the opportunity for a new start for the Japanese justice system, that the reforms proposed herein will steadily be put into effect, and that the justice system at the earliest possible time becomes one that is easy to use and meets the expectation and trust of the people.[98]

More citizen exposure to the courts is one way to achieve this objective.[99] Throughout its report, the JSRC uses language that clearly indicates that Japan's

[96] Lempert, *supra* note 90 at 58.
[97] The Council was chaired by Koji Sato, Professor of Law, Kyoto University. This group had over sixty meetings, held public hearings, did inspections of various justice-related organizations and conducted research visits to the United States, United Kingdom, Germany, and France. *See* Setano Miyazawa, *Reform in Japanese Legal Education: The Politics of Judicial Reform in Japan*: *The Rule of Law at Last?* 2 ASIAN-PACIFIC LT. POLICY 99 (2001) (discussing the make-up of the Council).
[98] JUSTICE SYS. REFORM COUNCIL, *supra* note 12 at "Conclusion," ch. IV, pt. 1. This article focuses on the introduction of a jury system but it should be pointed out that the Council also suggests other mechanisms for public participation including the selection of judges.
[99] *Id.* at ch. I, pts. 3(1).

objective in establishing a jury system is to empower the citizenry.[100] In language reminiscent of de Tocqueville, the report states:

> What commonly underlies these reforms is the will that each and every person will break out of the consciousness of being governed object and will become a governing subject, with autonomy and bearing social responsibility, and that the people will participate in building a free and fair society in mutual cooperation and will work to restore rich creativity and vitality to this country.[101]

With that objective in mind, the JSRC sought to create a mixed-jury (saiban-in) system. The reformers suggested a mixed-jury system in which judges and citizens deliberate together:

> In order to establish a stronger popular base for the justice system, measures shall be taken to expand participation of the people in the justice system. As a new system for popular participation in litigation proceedings which constitute the core of the justice system, a new system shall be introduced for a portion of criminal cases. Under this new system, the general public can work in cooperation with judges, sharing responsibility for and becoming involved in deciding case autonomously and meaningfully.[102]

The hope is that citizen participation will result in greater acceptance of the justice system and that having citizens work with judges will grant the judiciary wider public legitimacy. In addition, if lay judges participate as equals, the results of trials, (over ninety-six percent of which currently end in conviction), could become more balanced.[103] Moreover, greater citizen participation will bring increased legitimacy and respect to the judiciary by creating the perception that disputes are resolved openly and fairly.[104] In addition, De Tocqueville regarded jury duty as a great educational

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[100] *Id.* Chapter I "Fundamental Philosophy and Directions for Reform of the Justice System,"
[101] *Id.*
[102] *Id.* at ch. I, pt. 3(3).
[103] *See* Anderson and Nolan, *supra* note 6 at 943 (suggesting this potential benefit).
[104] In Russia the conviction rate was ninety-nine percent without juries. Preliminary indications with a jury system have reduced this figure to eighty-five percent. "Jury trials raise hopes for accused in Russia, but legal ranks skeptical." FRED WEIR, (Canadian Press, 2003) May 3**,**

opportunity, "a free school" to learn about democracy and the court system in particular.[105]

The JSRC's language regarding the objectives of jury trials and citizen participation is wonderfully inspirational. However, by adopting a mixed-jury system, the JSRC has greatly limited its ability to achieve these objectives. Inherent in the choice for a mixed-jury system is a distrust of the average Japanese citizen to effectively decide legal issues. While Japan wants to make its judicial system more understandable to its citizens, it is not prepared to entrust decisions solely to them, an approach seemingly inconsistent with the democratic ideals that prompted the call for reform in the first place. As the later section on Japanese culture will demonstrate, the actual participation of citizens in this type of mixed-system will be minimal as opposed to mixed.

HOW COLLECTIVE JUDGMENTS OCCUR

Juries are group decision-makers, so not surprisingly the process by which they deliberate is similar to other group decision processes.[106] A concept that pervades the scholarship on group decision-making is that of the "opinion leader".[107] The opinion leader exists in the jury as the "dominant juror."[108] The dominant juror often has a considerable effect on the deliberation process.[109] To mitigate or neutralize the influence

[105] De Tocqueville at 275.
[106] *See, e.g.*, Michael L. Berman, *Six-Member Juries: Does Size Really Matter?* 67 TENN. L. REV. 743 (2000) Symposium.
[107] Gabriel Weimann, THE INFLUENTIALS: PEOPLE WHO INFLUENCE PEOPLE (State University of New York Press, Albany, 1994).
[108] *See, e.g.*, Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51, 55-56 (1995).
[109] *See, e.g.*, Emma Cano, *Speaking Out: Is Texas Inhibiting the Search for Truth by Prohibiting Juror Questionong of Witnesses in Criminal Cases?* 32 TEX. TECH L. REV. 1013, 1035, (2001), *citing* 1990 Ellyn C. Acker, St*andardized Procedures for Juror Interrogation of Witnesses*, 1990 U. CHI. LEGAL F. 557, 559 (1990) (concluding that uninformed jurors results in persuasion).

of the dominant juror on the jury's decision-making process, studies are starting to examine jury characteristics and procedural devices, for selecting, instructing, and controlling juries.

As part of a group decision-making process, a person often emerges who takes the lead. This person dictates the agenda by which the decision is made, and ultimately has an inordinate impact on the final decision. This person, the so-called opinion leader,[110] has certain characteristics, such as perceived competence and specific expertise. Certainly when it comes to legal proceedings, judges have more experience and familiarity and are thus likely to persuade and lead decisions by a jury.[111]

The opinion leader analysis was applied specifically to the jury by Hastie, Penrod, and Pennington in their book entitled "Inside the Jury." In their research, primarily conducted through post-trial juror questionnaires, they found an individual juror's perceived persuasiveness was inextricably linked to the juror's level of education (and associated indicia such as income, social status, and occupation).[112] Much like the "opinion leader" these qualities are undoubtedly embodied by a judge in a manner that would allow him or her to emerge as the dominant juror during a trial.

The impact that the "opinion leader" has over decision-making is extensive. [113] A study conducted by Solomon Asch asked a group of individuals to observe a line that was

[110] Weimann, *supra* note at 107 at 74.
[111] See Anderson and Nolan, *supra* note 6 at 981 n. 225 (Deference is afforded judges in a mixed jury setting. *See, e.g.*, R. Arce et al., *Empirical Assessment of the Escabinado Jury System*, 2 PSYCHOL., CRIME & LAW 175 (1996) (showing post deliberation verdict change toward the judge's verdict by lay assessors observed in mock trial deliberations with one professional judge and five lay assessors). *See also* Alfonso Palmer, *Experimental Study of the Effects of Juror Composition*, 18 BOLETIN DE PSICOLOOGIA 49 (1988), cited in Ana M. Martin et al., *Discussion Content and Perception of Deliberation in Western European Versus American Juries*, 9(3) PSYCHOL., CRIME & LAW 247 (2003) (noting the greater change of initial verdicts within mixed juries during deliberations by lay assessors but not by the expert judges))
[112] Reid Hastie, Steven D. Penrod, Nancy Pennington, INSIDE THE JURY (Harvard University Press, 1983).
[113] Berman *supra* note 106.(equating group decision making with jury decision making).

drawn on a white card.[114] They were then asked to select one card from three; specifically the one which they thought best represented the line drawn on the original card.[115] There were eight participants in the study. In the first two selections all eight chose correctly. In the third round, some participants were told to select incorrectly in order to observe the impact this would have on the unknowing participant. Despite knowing the obvious error in the selection, Seventy percent of the subjects went against their senses and followed the incorrect majority at least once.[116] This effect was enhanced if the subject perceived himself to be a member of the group, something that a juror likely would feel about her relationship with her peer jurors.[117] Asch concluded, "That we have found the tendency to conformity in our society so strong that reasonably intelligent and well-meaning young people are willing to call white, black, this is a matter of concern."[118] The results of this study become even more disturbing as we explore the importance of group identity in Japanese culture. It is interesting to note in a Japanese study which measured the effect of different ratios of citizens to judges (2 judges-9 to 11 citizens or 3 judges-six citizens), the increasing of judges did not necessarily avoid the judicial dominance.[119]

In her study about group minority opinions, Elisabeth Noelle-Neumann identified a concept known as the "Spiral of Silence."[120] In her attempt to rationalize a sudden shift in German voting behavior days before an election, Noelle-Neumann observed that the

[114] Solomon Asch, SOCIAL PSYCHOLOGY (Oxford University Press, 1987).
[115] *Id.* at 13.
[116] *Id.* at 16
[117] Dominic Abrams, *Knowing What to Think by Knowing Who You Are*, 29 BRIT. J. SOC. PSYCHOL. 97, 112 (1990).
[118] Asch *supra* note 120 at 21.
[119] *See* Anderson and Nolan, supra note 6 at 976, n. 211 (Y. Ohtsubo et al., How Can Psychology Contribute to Designing a Mixed Jury System in Japan?: Ongoing Debates and a Thought Experiment, Paper presented at the Fourth Conference of the Asian Association of Social Psychology, Melbourne, Austl. (July 2001), available at http://www.nara-u.ac.jp/soc/staffs/ohtsubo/english.htm)
[120] Elisabeth Noelle-Neumann, THE SPIRAL OF SILENCE (University of Chicago Press, 1993).

position with the most vocal support appeared stronger than it really was and other positions appeared weaker. Once a position dominated the discourse proponents of the other positions were drowned out. She called this process a "spiral of silence."[121] According to the "spiral of silence" theory, a viewpoint that receives more vocal support can dominate and eventually extinguish competing opinions. Applying the "spiral of silence" to jury deliberations, the dominant juror is likely to be the most vocal or at least the most influential participant in the deliberations and may therefore actually silence other jurors.[122]

In 1970, the Supreme Court of the United States approved the constitutionality of a six-person criminal jury,[123] and later approved the constitutionality of a six-person civil jury;[124] prior to these decisions a twelve-person jury was constitutionally required.[125] Immediately following the Court's rulings, scholars began to study the effect that jury size has on the dominance of a single juror. Research suggests that because people's timidity and insecurity are greater in larger numbers thus rendering them less likely to speak,[126] a larger jury enhances the likelihood of domination by an individual juror.

A second area of research is the extent to which jurors are allowed to participate in the court proceedings. In an effort to enhance the understanding of jurors, especially in light of complex litigation, some courts have endorsed witness-questioning by

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[121] *Id.* at 5.
[122] Fred L. Strodtbeck & Richard D. Mann, *Sex Role Differentiation in Jury Deliberations*. 19 SOCIOMETRY 3 (1956).
[123] Williams v. Florida, 399 U.S. 78 (1970).
[124] Colgrove v. Battin, 413 U.S. 149 (1973).
[125] Thompson v. Utah, 170 U.S. 343 (1898).
[126] See e.g. Boster, Franklin. *An Information Processing Model of Jury Decision Making*. 18 Comm. Res. 524 note 108.

jurors.[127] In DeBenedetto,[128] the Fourth Circuit allowed juror-questioning in extreme circumstances yet warned of the power this gives to the dominant juror: "…one or two jurors often will be stronger than the other jurors, and will dominate the jury inquiries."[129] The court feared that the dominant juror who audibly relayed their questions would be able to influence fellow jurors and thus persuade and impose premature deliberation.[130] The court's fears were realized in DeBenedetto, when the dominant foreperson asked over half of the ninety five questions asked during trial.[131]

One way to allay such fears of juror dominance associated with audible witness questioning is to permit only written questions, reviewed and asked by the judge. Such an approach was endorsed by the Third Circuit Court of Appeals in 1999.[132]

A third area of focus that researches have looked at is juror note-taking with some concern that note-taking skills correlate to an individual's level of education thus creating a further opportunity for juror dominance.[133] However, a recent study showed that the connection between note-taking and deliberation dominating was not steadfast.[134]

Despite the seemingly unavoidable reality of the existence of the dominant juror, accurate decisions are still likely to be reached. One study showed that regardless of the make-up of the jury, a twelve-person panel was able to reach the correct decision eighty three percent of the time, compared to a sixty-nine percent accuracy for six-person

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[127] *See, e.g.*, Larry Heuer and Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 Judicature 256, (1996) (survey finding juror understanding increased with their level of participation).
[128] DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512 (1985).
[129] *Id.* at 516.
[130] *Id.* 516-517.
[131] *Id.* at 517.
[132] United States v. Hernandez, 176 F.3d 719 (1999).
[133] Prentice H. Marshall, *A View From the Bench: Practical Perspectives on Juries*, 1990 U. CHI. LEGAL F. 147, 158.
[134] Douglas G. Smith. *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA L. REV. 441, (1997) (finding that note-takers did not dominate proceedings).

panels. Similarly, a recent study showed that, groups, regardless of their make-up, were more accurate decision makers than individuals at least concerning complex matters.[135] Moreover, studies overwhelmingly show that larger groups are more likely to render accurate decisions.[136]

JAPANESE CULTURE

The importance of social status within Japanese culture was driven home for me during a six-week teaching experience in Japan.[137] The janitor of my office building would greet me each day with a low bow. One day, as a symbol of my respect for him, I tried to bow lower than him during our morning encounter. I saw that this made the janitor rather uncomfortable (which certainly was not my objective!). I saw similar examples of this consciousness of social status during dinners following my talks before various Japanese bar associations when I, as the honored guest, was seated next to the person of highest status (the President of the bar association).

Japan's unique cultural attributes present a large challenge to establishing meaningful citizen participation in the Japanese judicial system. Even in its report, the JSRCecognize s inherent impediments in Japanese society thatinhibit meaningful citizen participation. The people are accustomed to being governed, and view the "government as the ruler (the authority)."[138] The Council's recommendations seek to transform the people from passive to active participants in the operation of the government.[139]

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[135] Michael J. Saks, SMALL-GROUP DECISION MAKING AND COMPLEX INFORMATION TASKS (Federal Judicial Center, 1981). See *infra* note 181.
[136] Cheryl D. Block, T*ruth and Probabilitiy—Ironies in the Evolution of Social Choice Theory*, 76 WASH. U. L.Q. 975, 1037, fn 3.
[137] I taught Principles of American Law at Kwansei Gakuin University School of Law in Nishinomiya.
[138] JUSTICE SYS. REFORM COUNCIL, *supra* note 12 at ch. I pt. 1.
[139] A further indication of citizen passivity can be found in a statement by JSRC chairman Professor Emeritus Kofi Sato: "I think we have reached the situation where we have to re-think how human beings should live, that is as "autonomous individuals". I feel that the time has come to outgrow this society which

Japanese culture puts a high value on group relationships. The slang expression "going along to get along" is particularly applicable to Japanese culture. A distinction exists in Japanese society between what one says (tatemae) and what one really thinks (honne). Not expressing oneself honestly has a great deal to do with fitting in to the group. The emphasis on fitting-in is highlighted in elementary-school text books in Japan that state that good relationships with others are valued more than asserting one's own ideas.[140] The concept of harmony is a cornerstone of Japanese culture, a concept found in the first clause of an early Japanese constitution dating back to 697 A.D. "Harmony is to be valued, and an avoidance of wanton opposition to be honored." There is a Japanese proverb that captures the importance of harmony: "The nail that sticks up gets pounded down."[141]

What flows from this desire to get along is a great emphasis on group identification. Much of a Japanese individual's self-esteem comes with his/her group identification. Thus, group disapproval can be devastating. Some even suggest that group disapproval provides a powerful deterrent for crime in Japan.[142]

In addition to fitting in there is also great respect, and resulting deference to one's social status as reflected in wealth, profession, and position. The Japanese have a high level of respect for authority figures, a definite legacy of the Confucianism influence. There are three relationships prominent in Confucian ethic – father-son, ruler-subjects, and husband-wife. Each of these relationships emphasizes deference to the superior

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passively depends on regulation from above, and to rebuild and form a self-reliant base. The departure point is self-reliance based on the autonomous individual, so we have to prepare a social structure that facilitates this". *Cited* in Anderson and Nolan, *supra* note 6 at 944.

[140] ***Japanese Studies on Attitudes Towards Person with Mental Retardation*, 40 MENTAL RETARDATION 245-251 (June 2002).**

[141] Robert C. Christopher, THE JAPANESE MIND 53 (Linden Press: Simon & Schuster 1983).

[142] *Id.* at 163.

figure.[143] In a family, usually the opinion of the household head is the rule. Any dissenting opinions are regarded as disloyal.[144]

Similar status issues also appear in the language. In English, the word "you" is used to describe anyone regardless of status. In Japanese, age, gender, and status affect the form of address. Given the emphasis that in effective group decision-making everyone must be of equal status, it is somewhat problematic when the language itself calls attention to various status concerns.[145]

> The Japanese people prefer trial by "those above the people" rather than by "their fellows," and that this caused the Japanese to distrust juries from the beginning. People trust judges because they have a special sense of responsibility when adjudicating cases and try to keep their moral standards high in order to ensure impartial trials. Therefore, citizen participation in the judicial process is ultimately not suitable for the Japanese people because citizens would simply prefer to have a judge decide their case rather than their fellow citizens. Scholars disagree on exactly how much weight should be given to the cultural aspect of the failure of the earlier jury system in Japan, but most agree culture played some part.[146]

Anderson and Nolan would question the assumption that Japanese citizens would automatically defer to the judge's opinion. They point out that the JSRC, aware of this cultural perception thought that with the appropriate leadership and education this cultural deference would change over time.[147] Hierarchy, harmony, and group identity, are three powerful reasons why a mixed-jury system will tend to stifle free and open jury

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[143] Noriko Kamuchi, CULTURE AND CUSHIONS OF JAPAN (Greenwood Press, 1999); *See also*, Kiss, *supra* note 14; Christopher, *supra* note 141.
[144] *See* Chia Nakone, *Japanese Society* (1950), *reprinted in* JAPANESE CULTURE AND BEHAVIOR: SELECTED READINGS 155 (Takia Sigyang Lebra & William P. Lebra eds., 1978). Lempert, *supra* note 90 at 40.

[145] *Id.*
[146] Kiss, *supra* note 14 at footnotes 269-70.
[147] Anderson and Nolan, *supra* note 6 at 987.

deliberation, and leads to several questions. First, will the superior figure of the judge become the dominant juror and have an undue influence on the jury panel? In any society, judges are respected and have a great deal of influence. In the United States, "jurors typically begin their jury experience by viewing the judge with great deference. Jurors are laypersons, and look up to the judge, who is an authority figure, robed in black, seated on high with gavel in hand; clearly the judge is experienced and in control of the proceedings". [148] When we couple this with the hierarchal nature of Japanese culture, we are presented with a difficult problem especially when we consider the group-decision making data. Secondly, with the ideal of harmony engrained in the Japanese psyche will dissenting opinions be put forward? Finally, given the emphasis placed on group approval, how many jurors will take a position and risk the wrath of the group?[149]

As has been previously mentioned, a majority vote is all that the legislation required for conviction.[150] Although some studies have indicated that a majority vote or unanimous verdicts can be similar[151], the concern of the dominance of judges within the deliberation process might be alleviated if a unanimous vote were instituted. At a minimum, it would improve the perception of meaningful citizen deliberation. At a maximum, it might enhance the quality of argument during the deliberation process as

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[148] Nancy S. Marder, *Jury Process* Foundation Press (2005) at p.118- also see The Appearance of Justice Judges Verbal and non Verbal Behavior in Criminal Jury Trials 38 Stan. L. Rev. 89 (1985) discussing the how non verbal behavior of judges has an influence on jurors.

[149] I recall a story written by Linda Cox published in the *Boston Globe* about her experience as a juror. She maintained her position despite pressure of the group. Here is an excerpt from her account: "More wrangling, more shouting. Why are you being so unreasonable? (question from a fellow juror) Exhausted, I answered as best I could: I may be wrong, but I cannot vote to convict on evidence presented to us. There are too many doubts in my mind. I felt as much on trial as the defendant and, like him, presumed guilty." *Reported in* Doris Sue Wong, *A Lone Juror Holds Out, Aids Quest for Freedom*, BOSTON GLOBE, April 1, 1990.

[150] *Supra* note 29.

[151] *See* Anderson and Nolan, supra note 6 at 980 n. 221 (Ana M. Martin et al. *„Discussion Content and Perception of Deliberation in Western European vs. American Juries*, 9(3) PSYCHOL., CRIME & LAW 247 249 (2003)).

one holdout would have to be convinced to change positions.[152] Certainly a unanimous vote or a minimum 2/3 vote would foster greater deliberation because it would be necessary to convince jurors not agreeing with the majority position.

SPECIFIC RECOMMENDATIONS

Notwithstanding the basic structure of the mixed-jury system, there are a number of implementary and procedural measures that can ensure "meaningful and autonomous participation." Although, as previously expressed, there are some inherent problems with mixed-juries, the following recommendations are made in light of the confines of the system adopted by the Japanese Diet.

PRINCIPAL OF ORALITY

The trend in Japan has been toward greater orality, and non-oral evidence is only admissible with the consent of the parties. The term orality refers to evidence presented to the factfinder through the testimony of live witnesses. Even with a guilty plea consent is required for the introduction of a written statements. Orality during contested trials should go a long way to putting the prosecution and defense on equal footing so that prosecutors unable to rely on written documents wll need to work harder by presenting witnesses at trial in order to prove their cases.

Another reason for the high conviction rate is the use of confessions. Confessions are allowed in a vast majority of cases and often form the basis for the conviction. Since suspects may be detained for up to 23 days before charging, it is not surprising that

[152] *See Id.* at 981, n. 223 (C.J. Nemeth, Dissent, Diversity and Juries in Social Influence in Social Reality: Promoting Individual and Social Change 23 (F. Butera & G. Mugny eds., 2001); *See* generally C.J. Nemeth et al., Devil's Advocate versus Authentic Dissent: Stimulating Quantity and Quality, 31(6) EUR. J. SOC. PSYCHOL. 707, 707-20 (2001)).

confessions are obtained.[153] Because of their importance in the system, there is a great deal of pressure on prosecutors to secure confessions. This pressure, coupled with the 23-day detention could lead to abusive tactics in obtaining confessions.[154] Greater orality in the system, will help expose the possible abuses in obtaining confessions.

Orality also allows the system to take advantage of the collective wisdom and common sense of the jury; the jury must evaluate live witnesses to access their verbal and non-verbal attributes. "To ensure that saibin-in who are laypersons, can sufficiently form decisions by examining the evidence presented at trial, it is necessary to materialize the principles of orality and directness."[155] Another concern for jury comprehension is that trials presently within the jury trial jurisdiction once commenced are often interrupted and continued for various periods (weekly or a month). To maximize the benefits of orality and ensure that jurors memories remain intake, once a trial begins it should be completed without interruption.

The only exception to the principle of orality should occur when the witness is unavailable (out of the jurisdiction or ill) and there exists some indicia of truthfulness of the out-of-court (on a par with the rules of hearsay developed in American jurisprudence). A deposition with all parties represented might provide sufficient truthfulness to allow for such an exception. A section of the legislation would seem to minimize the importance of orality as it allows for examinations of witnesses outside of the courthouse. It does, however, allow for the presence of jurors who may then

[153] Japanese Code of Criminal Procedure –Article 203, 205, 208.
[154] It should be pointed out that there are provision for protecting the suspect from being compelled to incriminate himself . Japanese Constitution Article 38 . Article 198(2) of the Japanese Code of Criminal Procedure states "In the case of questioning… the suspect shall, in advance, be notified that he is not required to make a statement against his will."
[155] JUSTICE SYS. REFORM COUNCIL, *supra* note 12 at ch. IV, pt. 1(4a).

participate in the examination.[156] This provision is limited to witnesses who because of health, age, occupation or other limitations, cannot testify in court.[157]

ACTIVE ROLE FOR JURORS

A movement in the United States has begun to reform the jury system so as to encourage jurors to take a more active role during the trial.[158] The assumption that jurors who passively sit throughout a trial will retain and understand the evidence is hardly consistant with educational pedagogy. It is thought that greater juror comprehension will occur if steps are taken to involve jurors before the Judge's instructions at the end of the trial, so methods have been developed to involve jurors more in the trial process.[159]

This greater involvement of jurors will result in a more knowledgable jury. More knowledge in a mixed system is crucial to leveling the playing field between the judges and jurors. To this end the Japanese legislation allows for jurors to participate in the questioning of all the witnesses including the defendant.[160]Although there were no provisions for note-taking in the legislation, one would assume that it is allowable. It appears that deliberation is to occur at the end of the trial.[161] I would suggest that they implement a pre-deliberation mechanism. Most jurisdictions in the United States frown

[156] *Id*. art 57.
[157] Japanese Code of Criminal Procedure stipulates that a court may examine a witness out of the courthouse, when it (a) counsels a public prosecutor and a defendant or his/her attorney, (b) considers the importance of the witness, his/her age, occupation, health condition, other matters and the gravity of a case, and (c) deems such a examination is necessary. C.C.P. art 158.
[158] These methods include: predeliberation discussions, juror notetaking, instructions at the beginning of trial in addition to the instructions at the conclusion of a trial, and questions by jurors during the proceedings.
[159] Robert G. Boatright, The 21st Century: Reflections from the Cantigny Conference, 83 Judicature 288, 294(2000); Edward L. Barrett, Jr., *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV 1169 (suggesting ten ways to reform the American jury). *See* also *Jurors:The Power of 12*, The Arizona Supreme Court Committee on the More Effective Use of Juries (1994). A study done by the American Judicature Society in 1998 indicated that thirty-nine percent of the American courts allowed for note-taking, pre-deliberation discussion of the case by jurors, and questioning by jurors during the proceedings.
[160] *Criminal Trial*, *supra* note 29, article 56-59.
[161] *Id*. article 66

on such deliberations, as they are concerned that jurors will make up their minds before they have heard all the evidence. However, with a judge present, such pre-deliberation discussions could avoid such a predetermination as the judge will carefully monitor the discussions. These preliminary discussions help jurors retain and process the pieces of information they are hearing. This predeliberation would be especially useful during a long trial. In addition I would recommend pre-trial instructions as to the law and explanations as to the various trial procedures and type of rulings be given to the jurors. At the start of the trial these instructions should include the various elements of the crime before the jury as well as the procedural steps to be followed during the trial. This approach will not only address the power imbalance but will aid the saiban in understanding the importance and relevance of the evidence and will help them remember the evidence during the final deliberation process.[162]

DELIBERATIONS

Since jury deliberations in the United States are conducted in great secrecy, little is known about how jurors actually deliberate. Each jury is free to structure the deliberations as it sees fit with the only requirement being the selection of a foreperson. Jurors in the United States report that they would often go into deliberations without being given guidance as to how to deliberate.[163] Because of my previously expressed concerns about the Japanese mixed-jury system, I would suggest a carefully structured deliberation process.

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[162] Juries for the Year 2000 and Beyond, PROPOSAL TO IMPROVE THE JURY SYSTEM IN WASHINGTON D.C. see recommendation 27 at p.61- http://www.courtexcellence.org/juryreform/juries2000_final_report. *See* also *Jurors:The Power of 12,* The Arizona Supreme Court Committee on the More Effective Use of Juries (1994).

[163] *Id.* Juries for the year 2000- Recommendation 29 at p.65.

Foreperson

The conduct of the judge(s) on the mixed jury during the deliberation is crucial. Judges should be trained so as to allow for meaningful and autonomous participation of lay jurors. Although the legislation does not reflect this safeguards, there is at least recognition of concerns centering on the active participation of lay jurors during the deliberation process. One requirement notes that jurors must be given an opportunity to state their opinion and that the judges are required to see that the opportunity arises. [164] To this end, I suggest that a layperson be chosen as a foreperson (leader of the jury). I would have the presiding judge select this person based upon the judge's assessment of the person's leadership and character. This foreperson should be given a simple instruction manual and/or video to describe his/her responsibilities. By having a layperson as chair of the jury deliberation, I would hope to diminish the role of the judge. An additional safeguard would require the foreperson to meet with each juror privately and solicit his/her position. In this way, each juror would not be influenced by the conformity principles found in the society. Judges should also withhold their opinions until each juror has expressed his/her opinion. It is worthy to note that many japanese judges, sitting in panels of three, are accustomed to having the younger judges express their opinion first so as to eliminate the hesitation that less experienced judges may have in expressing their opinion.

Before expressing their opinion, judges should act more as evidentiary advisors to the lay jurors. During deliberation, judges should help ensure that the evidence is given its appropriate weight. For example, evidence which is highly prejudicial because of its emotional appeal, the judge should suggest that it not be given

[164] Criminal Trial Article 66

undue weight. Because evidentiary rules can be complex and difficult for lay persons to understand, an advantage that a mixed-jury system has is that the elaborate evidence rules found in the United States are not necessary. The evidentiary rules exist largely because of an inherent distrust that the jurors will misuse information.

To insure meaningful citizen participation and to guard against the judge's control of the deliberation, the jury decision should be a detailed record of the process. The JSRC recognized the need to have a transcript of jury deliberation to ensure the trust of the public, litigants, and to retain an appeal-able record.[165] Stephen C. Thurman recommends the French system in which the presiding judge summarizes the argument of the defense and prosecution and then has a series of questions regarding the facts. The jury's response to these questions will then be utilized in applying the law, and the answer will also be included in the record.[166] This approach is similar to the special-verdict approach utilized in the United States Law, in which jurors decide fact issues on a case-by case basis without considering issues of law.[167] Their responses to these questions are recorded and the trial proceeds under the aegis of their answer. Moreover, as Professor Mark Brodin points out, the special verdict is an adequate procedural remedy to the problem of jurors' confusion with legal concepts inherent when they are called upon to determine mixed law and fact questions.[168] In additon, a jury instruction explicitly stating that the jurors are indeed independent and are free to disagree with the judge is imperative.

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[165] JUSTICE SYS. REFORM COUNCIL, *supra* note 12 at ch. IV, pt. 1(4)(b).
[166] *See Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures,* 2001 ST. LOUIS-WARSAW TRANS'L L.J. 89 at 109 (2001*)* (thoughtfully presenting how best to ensure actual lay participation).
[167]Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process–The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15.
[168] *Id.* at 22.

Educate the Public

Since service by the initial group of jurors will be a totally new experience, it is imperative that the notice to jurors empathetically consider and address many of the jurors' concerns. Brochures or videos should be sent describing the importance of this civic service as well as how it will operate. Carefull marketing should be employed so as to alleviate anxiety as well as provide positive encouragement and incentive to show up. Such mundane issues as how to get to the court, the time of lunch break, the appropriate dress, should all be addressed.[169]

To ensure that citizens become more aware of their role as jurors, a massive public education program should be initiated. This program should include a broad assortment of tools including: tours of the courthouse, educational television about the role of the jurors presented by judges and attorneys, an introductory video or lecture by the judge to jurors on their day of service and publication of easy to read pamphlets and other reading material. In addition, the idea of jury service should be introduced to school children at an early age. To this end teachers should be trained and curriculum adjusted. Hopefully, such a program will help to alleviate the cultural concerns mentioned earlier.[170]

SELECTION PROCESS

Jury Pool

[169] Supra note 162 recommendation 3-5 at p.5-7

[170] The state of Arizona has done a great deal of thinking about effective ways to use juries. *See* Official State Website at www.supreme.state.az.us/jury.htm.

With regard to the selection process of jurors, Japan should not make the same mistake historically made in the United States of readily granting many exemptions to perspective jurors. Often people with higher-ranking societal positions ask for, and receive, exemptions from jury service. A movement to eliminate exemptions took place in the early 1980's as jury service became less burdensome. Each juror was guaranteed that his/her service would be limited to one day or, if chosen, to one trial. The one day/one trial system is now prevalent throughout the United States. Once a juror fulfills this requirement, he/she will be exempt from further service for at least three years. In proposing this approach, I recognize that many countries utilize mixed jury jurors who serve for a period of several years.[171] Although I see the benefit of this experience to ensure a more confident and forceful juror, I am concerned that the extent of the commitment might eliminate certain well-educated members of the Japanese society with important positions (e.g. doctors, teachers). I would advocate for less-experienced, more-intelligent jurors than more-experienced, less-intelligent jurors.

With exemptions utilized, it is not uncommon to have a jury panel made up of elderly or underemployed people. The reduction and elimination of exemptions has resulted in a more meaningful cross-section of jurors. In this way, more people with responsible, societal positions will be part of the jury. From the data on collective decision making previously discussed, it appears that better-educated individuals would have more confidence to express their position in deliberation with a judge, who is perceived as an individual with an elevated societal status.

[171] John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative fill the American Need?* 1981 AM. B. FOUND. RES. J. 195, 206 (1981). In Germany, jurors are selected to serve four year terms.

People who are 20 years or older and eligible to vote and have completed 9 years of compulsory education or can demonstrate equivalent learning are eligible for jury service.[172] Similar to the American trend of one trial or one day, the legislation allows a juror to refuse service if they have previously served within five years.[173] There are numerous exemptions including governement officials and anyone associated with the court and a catch-all discretionary exemption "…their business will suffer damage if they do not handle the important matter relating to the business."[174] I have concerns that this type of general exemptions might result in jurors with lesser social status to selected participate equally with the judges.

The system adopted by the Diet also has a provision for preemptory challenges to jurors.[175] This provision is rather troubling in light of the prosecutor's considerable success in the high rate of conviction. He/she might be inclined to exercise his/her preemptory challenges on jurors who are well educated and more likely to express themselves in the deliberation.[176]

Impartiality

The goal of any jury system is to have impartial jurors. But what is meant by "impartial" is a crucial consideration. By "impartial" I do not mean absolute ignorance of the case. Mark Twain, a famous American author, commented in 1871 as follows: "a noted desperado (criminal) killed Mr. B, a good citizen, in the most wanton and cold-blooded way . . . the papers were full of it, and all men capable of reading read about it."

[172] *Criminal Trial*, *supra* note 29, at art.art 13 and art. 14(1)(i). Requirement for completing compulsory education (9 years) unless there is a demonstration they have the requisite intelligence.
[173] ***Id*.** at art. 16 1)d)
[174] *Id.* at art. 16 1)g)
[175] *Id*. at art. 36. Three premtory chllenges are allocated to the public prosecutor and the defense attorney.
[176] *See* Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 5 NW. U. L. REV. 190, 194 (1990). See also Bateson v. Kentucky, 476 U.S. 79, 92 (1986); Georgia v. McCollum, 505 U.S. 42 (1992); JEB v. Alabama, 511 U.S. 127 (1994)

The odd lot of "fools and rascals," who neither read nor talked about the case, was sworn in as the jury. Twain commented, "The system rigidly excludes honest men and men of brains."[177] When a case is highly publicized, jury selection works to lower the educational level of jurors. For example, people who read a daily newspaper or watch or listen to the news will be eliminated because they follow the events too closely. In order to ensure that a jury is composed of informed citizens, I would define the impartial standard more flexibly. As opposed to focusing on knowledge about a particular case, I would focus instead on juror open-mindedness and willingness to consider only the evidence presented at the trial. In this way, the jury won't exclude "men of brains." Impartiality is mentioned in the legislation but it remains to be seen how it will be interpreted.[178]

CONCLUSION

Even though I have substantial concerns regarding the configuration of the juries in Japan, I have no doubt that group solutions are usually better than individual solutions and larger group solutions are ordinarily better than smaller group solutions.[179] Groups will tend to remember more than an individual, and individual prejudice can be neutralized in a group setting. The Supreme Court of the United States considered the issue of a five-person jury in *Ballew v Georgia*.[180] After reviewing the research data[181]

[177] Mark Twain, ROUGHING IT 256 (Signet Classic, New American Library, 1872).
[178] *Criminal Trial*, *supra* note 29, at art. 34 and art. 18 which is a provision on impartiality.
[179] Lempert, *supra* note 90 at 50; *cited in* Hastie, Penrod, Pennington, *supra* note 112.
[180] 435 U.S. 223 (1979).
[181] Ballew turned to the following research: *E.g*., Michael J. Saks, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE, (Lexington Books, 1977); Davis, Kerr, Atkin, Holt, & Mech,*The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Third Majority Rules*, 32 J. OF PERSONALITY & SOC. PSYCH. 1 (1975); Richard Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975); Stuart S. Nagel &

the court concluded that numerosity insured more effective group deliberation.[182] Saks also found the greater the size of the jury the more likely it would be accurate.[183] The studies cited do not reflect the status differences among the jurors as would exist in the mixed-jury system in Japan.[184]

The hope is that this is a first step in the implementation of the Japanese jury. Subsequent steps with the JSRC primary intent of creating a "popular base" in mind might move from mixed juries to the American model of exclusively citizen juries. Also it is hoped that as juries become more inculcated into japanese society expansion of jury

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Marion Neef, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict*, 1975 WASH. U. L. Q. 933 (1975); Shari Seidman Diamond, *A Jury Experiment Reanalyzed*, 7 U. MICH. J.L. REFORM 520 (1974); Michael J. Saks, *Ignorance of Science Is No Excuse*, 10 TRIAL 18 (1974); Edward Thompson, *Six Will Do!*, 10 TRIAL 12 (1974); Hans Zeisel, *Twelve is Just*, 10 TRIAL 13 (1974); Hans Zeisel & Shari Seidman Diamond, "*Convincing Empirical Evidence" on the Six Member Jury*, 41 U. CHI. L. REV. 281(1974); *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, 6 U. MICH. J.L. 671 (1973); Joan Kessler, *An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes*, 6 U. MICH. J.L. 712 (1973); Andrew W. Bogue & Thomas G. Fritz, *The Six-Man Jury*, 17 S.D .L. REV. 285 (1972); H. Friedman, *Trial by Jury: Criteria for Convictions, Jury Size and Type I and Type II Errors*, 26-2 AM. STAT. 21 (1972); Institute of Judicial Administration, A COMPARISON OF SIX- AND TWELVE-MEMBER CIVIL JURIES IN NEW JERSEY SUPERIOR AND COUNTY COURTS (1972); William R. Pabst, Jr., *Statistical Studies of the Costs of Six-Man versus Twelve-Man Juries*, 14 WM. & MARY L. REV. 326 (1972); Hans Zeisel, *The Waning of the American Jury*, 58 A.B.A.J. 367 (1972); New Jersey Criminal Law Revision Commission, SIX-MEMBER JURIES (1971); David F. Walbert, Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 CASE W. RES. L. REV. 529 (1971); Hans Zeisel,…*And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971).

[182] Two researchers have summarized the findings of thirty-one studies in which the size of groups from two to twenty members was an important variable. They concluded that there were no conditions under which smaller groups were superior in the quality of group performance and group productivity. Edwin J. Thomas & Clinton F. Fink, *Effects of Group Size*, 60 Psych. Bull. 371, 373 (1963), *cited in* Richard Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643, 685 (1975); *See* Michael J. Saks, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE 107 (Lexington Books, 1977).

[183] Another doubt about smaller juries arises from the increasing inconsistency that results as the size decreases. Saks argued, "more a jury type fosters consistency, the greater will be the proportion of juries which select the correct (i.e., the same) verdict and the fewer 'errors' will be made." **From his mock trials held before undergraduates and former jurors, he computed the percentage of "correct" decisions rendered by 12-person and 6-person panels. In the student experiment, 12-person groups reached correct verdicts 83% of the time; 6-person panels reached correct verdicts 69% of the time. The results for the former-juror study were 71% for the 12-person groups and 57% for the 6-person groups.** Saks, *supra* note 180, *jury verdicts* at 86-87 (working with statistics described in Harry Kalven & Hans Zeisel, THE AMERICAN JURY 460 [University of Chicago Press, 1966]). **bb- is this a quote?**

[184] How can Psychology Contribute to Designing A Mixed-jury system In Japan?: Ongoing Debates and a Thought Experiment by Ohtsubo, Fujita and Kameda to appear in the proceeding of the 4th Conference of the Asian Association of Social Psychology: "Progress in Asian Social Psychology (Vol. 4)."

decision making will take place. The JSRC indicated that flexible as they discussed the creation of an appropriate environment for the introduction of a new jury system as well as a constant monitoring and modification of the system to insure a "popular base."[185]

[185] JUSTICE SYS. REFORM COUNCIL, *supra* note 7 at ch. IV pt. 1; *see* Thaman, *supra* note 5 (pointing out that in Germany for less serious crimes there is a mixed panel of one judge and two citizens or in Sweden there is one judge and 3 citizens for lesser crimes and one judge and five citizens for serious crimes).